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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

RICHARD KIPPERMAN et al., Plaintiffs and Appellants, v. WELLS FARGO BANK, N.A. et al., Defendants and Respondents.	D073665 (Super. Ct. No. 37–2017–00012818–CU-OR-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Timothy Taylor, Judge. Affirmed.

Law Offices of Ronald H. Freshman and Ronald H. Freshman for Plaintiffs and Appellants.

Severson & Werson, Jan T. Chilton, Kerry W. Franich and Elizabeth C. Farrell, for Defendants and Respondents.

Plaintiffs Richard Kipperman, U.S. Bankruptcy Trustee for the Chapter 7 estate of Carlos Eduardo Padilla, and Carlos E. Padilla, an individual (Padilla; collectively, plaintiffs), appeal the trial court order and judgment entered thereon sustaining without

leave to amend the demurrer of defendants Wells Fargo Bank, N.A. (Wells Fargo) and U.S. Bank National Association, as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2006–AR2 Trust (U.S. Bank; collectively, defendants) to plaintiffs' first amended verified complaint (FAC).

On appeal, plaintiffs claim the court erred in sustaining the demurrer without leave to amend based on its findings that (i) all causes of action in the FAC were time-barred; (ii) plaintiffs' conclusory tolling allegations were insufficient to "rescue" such claims; and (iii) the various causes of action also suffered from many other defects that rendered them susceptible to demurrer without leave to amend. Affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

This is the second appeal Padilla has filed in this court regarding the *same* litigation (*Padilla II*). In 2016, we affirmed in *Padilla v. Wells Fargo, N.A. et al.* (Jan. 5, 2016, D067521 [nonpub. opn.] (*Padilla I*)) the trial court's order sustaining without leave to amend Padilla's action against Wells Fargo, U.S. Bank, and others that Padilla had filed on May 21, 2014, in Superior Court of San Diego County (case No. 37-2014-00016399–CU–OR–CTL.) We concluded in *Padilla I* the trial court was correct in finding that Padilla had no standing to bring such an action because the claims in that action were assets of the bankruptcy estate, as a result of a Chapter 7 petition Padilla had filed on April 12, 2013, in the United States Bankruptcy Court for the Southern District of California, case No. 13-03757–LA7 (sometimes, bankruptcy action). Plaintiffs, however, were able to refile the instant action because the trial court in *Padilla I* had dismissed it without prejudice, allowing Padilla to seek relief from the bankruptcy court.

Plaintiffs refiled the instant lawsuit on April 10, 2017. In August 2017, plaintiffs filed their FAC, which asserted the same allegations involving the same primary rights as the operative complaint in *Padilla I*, roughly broken down as follows into "two categories of alleged misconduct": (1) activities by Wells Fargo when Padilla obtained his home loan in 2005; and (2) activities of defendants in fall 2012 and early 2013 in connection with the foreclosure of his house in Chula Vista (the Property), after Padilla defaulted on the loan. As was the case in *Padilla I*, defendants in *Padilla II* demurred to the FAC, which, as noted, the court sustained without leave to amend.

As we stated in *Padilla I*, in December 2005 Padilla "obtained a $540,000 secured loan from Wells Fargo to purchase [the Property]. The deed of trust named Wells Fargo as beneficiary and Fidelity National Title Insurance Company as trustee. . . .

"In December 2012, Wells Fargo's agent, NDEx West, LLC (NDEx), recorded a notice of default on Padilla's loan. The next month, Wells Fargo recorded a notice of assignment of Padilla's deed of trust to an entity identified as 'U.S. Bank National Association, as trustee for Wells Fargo Asset Securities Corporation, Mortgage Pass–Through Certificates, Series 2006–AR2.' . . . Wells Fargo, as the servicing agent for U.S. Bank, then recorded a substitution of trustee document, stating NDEx is the new trustee on Padilla's deed of trust.

"In March 2013, NDEx recorded a notice of trustee's sale, scheduling a nonjudicial foreclosure sale of the Property for April 15, 2013. Three days before the sale was to take place, Padilla (represented by counsel) filed [his] Chapter 7 bankruptcy petition. In the bankruptcy petition, Padilla identified Wells Fargo as a creditor with an undisputed

secured interest in the Property. He also filed a form stating he was claiming the Property as exempt, and he intended to 'Surrender[]' the Property.

"Based on the bankruptcy filing, the foreclosure sale was postponed.

"In July 2013, the bankruptcy court granted Padilla a discharge, which eliminated Padilla's legal obligation to pay certain of his debts. Three months later, in September 2013, Padilla's bankruptcy case was closed.

"Four months later, in January 2014, the substituted trustee on Padilla's deed of trust (NDEx) conducted a foreclosure sale of the Property. At the sale, U.S. Bank purchased the Property through a credit bid of the amount owing on the loan ($435,000). About three months later, in April 2014, Wells Fargo (as 'Attorney in Fact' for U.S. Bank) brought an unlawful detainer action against Padilla, seeking unpaid rent and to remove him from the Property now owned by U.S. Bank.

"Less than one month later, Padilla brought [*Padilla I*] . . . alleging defendants committed fraud at the inception of the loan, violated statutory and common law duties by misrepresenting information regarding the loan and the identity of the note holder, and engaged in misleading and improper transfers and assignments of the loan and deed of trust.

"[¶] . . . [¶]

"Padilla then filed a lengthy amended complaint, asserting nine statutory and common law causes of action [including for cancellation of instruments; negligence; slander of title; violation of Business and Professions Code section 17200 (UCL); accounting; violation of the California Homeowners Bill of Rights (CHBR); fraud;

wrongful foreclosure; and violation of Civil Code section 51. Footnote omitted.] Padilla identified numerous alleged wrongful acts, including: (1) Wells Fargo discriminated against him in the loan and foreclosure transactions because he 'is a Hispanic man of Mexican . . . origin'; (2) the loan was an illegal ' "table funded" ' transaction; (3) defendants improperly assigned and transferred interests in the Property and none of the defendants had valid rights in the note, deed of trust, or the Property; and (4) defendants misrepresented and/or omitted material facts in the various statutory notices and other documents. Padilla alleged he had filed his Chapter 7 bankruptcy petition 'in an attempt to find resolution for the loan.' Padilla attached to the complaint the various recorded title documents, including the grant deed, promissory note, deed of trust, notice of default, substitution of trustee, notice of trustee's sale, and trustee's deed upon sale.

"Defendants [in *Padilla I*] demurred to the [amended] complaint on various grounds including: (1) Padilla's claims were barred by his bankruptcy petition; (2) Padilla's causes of action claiming defendants lacked authority to issue the statutory notices and/or conduct the foreclosure sale are unsupported by California law; and (3) Padilla failed to allege he is willing and able to tender the amount owed on the loan. Defendants requested the court take judicial notice of various recorded title and loan documents (most of which were attached to Padilla's complaint), and of the bankruptcy filing and orders.

"In opposition, Padilla argued his causes of action were valid under California law and his bankruptcy filing did not bar the current action. Padilla also objected to the court

taking judicial notice of the recorded documents, but did not object to the court considering the bankruptcy documents.

"In its tentative ruling, the court found Padilla's claims were barred because the claims 'appear to be assets of the bankruptcy estate' and Padilla 'does not deny this.' The court stated: '[t]he appropriate action would be for plaintiff to re-open his bankruptcy case and get a determination from the bankruptcy court (that the claims have been abandoned).' The court also found that 'based on a review of the confusing, convoluted and overly-pled [a]mended [c]omplaint, it is not clear that' Padilla's allegations support a valid claim under California law. The court concluded: '[P]laintiff is directed to seek leave of the Bankruptcy Court before proceeding further with the claims asserted in the [a]mended [c]omplaint. . . .

"The court then held a hearing. A transcript of this hearing was not included in the appellate record. After the hearing, the court issued a signed minute order stating it was 'vacat[ing]' its tentative ruling and dismissing the case without prejudice. The order stated the court grants defendants' 'request to dismiss the civil matter' and 'orders the civil case dismissed without prejudice.' The court also ordered 'the Unlawful Detainer case [to] be deconsolidated.' "

As noted, in *Padilla I* we affirmed the order sustaining the demurrer without leave to amend on the ground that Padilla's claims were assets of the bankruptcy estate. Following remand, Padilla in May 2016 reopened the bankruptcy action in order to file an "adversary proceeding" to "pursue Debtors claims against Wells Fargo" and others for "invalidity of contracts (Note and Deed of Trust), cancellation of instruments, slander of

title, fraud and deceit, misrepresentation, tortious interference, accounting, wrongful foreclosure, violation of the Unruh Act, discrimination and other such undetermined claims for an illegal mortgage loan in which the above listed parties wrongfully foreclosed upon when said debt was not owned by any of the parties."

In July 2016, the owner of the Property, third-party Maham Corp. (Maham), entered into a stipulated judgment with Padilla in which he agreed to move out of the Property by September 15, 2016. Because Padilla in fact moved out of the Property in a timely manner, the judgment against Padilla was vacated and the unlawful detainer case was dismissed without prejudice, as provided under the terms of the stipulation.

As noted, plaintiffs refiled the instant action on April 10, 2017. As also noted, defendants demurred to the FAC, which the court sustained without leave to amend. In so doing, the court ruled as follows: "The pleadings, and the matters of which judicial notice is properly taken, establish that the claims are time-barred. The vague allegations of equitable tolling are insufficient to rescue the time-barred claims. Even if plaintiffs were able to overcome the time bar, each of the 'kitchen sink' counts alleged in the FAC is defective for the myriad of reasons set forth in the moving papers" of defendants.

"[¶] . . . [¶]

"It is ordinarily an abuse of discretion to deny a request for leave to amend unless the inability to state a valid cause of action is clear. In this respect, plaintiffs have the burden to show in what manner they can amend the FAC and how the amendment will change the legal effect of the pleading. [Citation.] Plaintiffs make no real effort to comply with this requirement. Inasmuch as the court concludes this action is really a

speculative effort to fund a no asset bankruptcy, and in light of the fact plaintiffs have already amended once, leave to amend is denied."

DISCUSSION

A. *Standard of Review*

It is axiomatic that a "demurrer tests the legal sufficiency of the complaint." (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497.) Defendants demurred to the FAC on the ground that the "pleading does not state facts sufficient to constitute a cause of action." (Code Civ. Proc., § 430.10, subd. (e).)

We review de novo a judgment of dismissal based on a sustained demurrer. (*Doan v. State Farm General Ins. Co.* (2011) 195 Cal.App.4th 1082, 1091 (*Doan*).) We will reverse the judgment of dismissal if the allegations of a complaint state a cause of action "under any legal theory." (*Ibid.*) We assume the truth of all properly pleaded facts alleged in the FAC, including those subject to judicial notice, but not conclusory factual or legal allegations contained in the complaint. (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924 (*Yvanova*); *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6 (*Evans*) [treating a demurrer as " 'admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law' "].) To the "extent the factual allegations conflict with the content of the exhibits to the complaint [or matters judicially noticed], we rely on and accept as true the contents of the exhibits" and ignore the conflicting allegations. (*Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 505 (*Barnett*).) Litigants may allege inconsistent theories but not inconsistent facts (*Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 827–828), and "[s]pecific factual

allegations modify and limit inconsistent general statements." (*B & P Development Corp. v. City of Saratoga* (1986) 185 Cal.App.3d 949, 953.)

B. *Judicial Notice*

Before turning to the FAC and determining whether it supports any valid cause of action (see *Doan, supra,* 195 Cal.App.4th at p. 1091), we take up the issue of whether the trial court erred, as plaintiffs claim on appeal, by taking judicial notice of certain documents, some of which plaintiffs attached to, and incorporated by reference in, the FAC. The record shows defendants requested the court take judicial notice of 26 items in connection with their demurrer. Plaintiffs opposed the request only as to eight such items.

With respect to the following six items, plaintiffs opposed the request only as to the "truthfulness of any statements made therein": (1) the December 22, 2005 deed of trust (DOT) recorded in the Official Records of the San Diego County Recorder's Office on December 28, 2005, as Instrument Number 2005–1108595; (2) the Corporate Assignment of Deed of Trust dated January 2, 2013, and recorded in the Official Records of the San Diego County Recorder's Office on January 7, 2013, as Instrument Number 2013–0011463; (3) the Substitution of Trustee dated February 20, 2013, and recorded in the Official Records of the San Diego County Recorder's Office on March 7, 2013, as Instrument Number 2013–0147850; (4) the Notice of Default and Election to Sell Under Deed of Trust dated December 4, 2012, and recorded in the Official Records of the San Diego County Recorder's Office on December 6, 2012, as Instrument Number 2012-0764456; (5) the Notice of Trustee's Sale dated March 18, 2013, and recorded in the

Official Records of the San Diego County Recorder's Office on March 21, 2013, as Instrument Number 2013–0179888; and (6) the Chapter 7 Voluntary Petition and Schedules filed April 12, 2013, in the bankruptcy action.

Plaintiffs also opposed the request of the following two items on the basis such documents served "no purpose . . . especially at the pleading stage": (7) the discharge of debtor filed July 30, 2013, in the bankruptcy action; and (8) the Trustee's Deed upon Sale dated January 29, 2014, and recorded in the Official Records of the San Diego County Recorder's Office on January 31, 2014, as Instrument Number 2014–0043016.

The record shows the trial court overruled plaintiffs' objections.[1] In so doing, the court noted that it could take judicial notice of the "acts and records of a federal court" (Evid. Code, § 452, subds. (c) & (d)); the " '*existence* of judicial opinions and court documents, along with the truth of the results reached[]in the documents such as orders, statements of decision,' " but not the " 'truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact' [citation]"; and " 'recorded deeds.' [Citations.]" The court also recognized the limits of judicial notice, noting that although the "*existence* of a document may be judicially noticeable, the truth of statements contained in the document and its *proper interpretation are not subject to judicial notice* if those matters are reasonably disputable. [Citations]."

Finally, the court recognized that if facts subject to judicial notice render an otherwise facially valid complaint defective, such as when a complaint contains

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1 A transcript of the demurrer hearing is not included in the appellate record.

allegations of fact that are inconsistent with the attached documents, or allegations contrary to facts that are judicially noticed, such " ' "[f]alse allegations of fact . . . may be disregarded" ' " and "treated as a nullity."

On appeal, plaintiffs argue the trial court wrongly treated the allegations in the FAC that conflicted with the documents they attached to the FAC as a " 'nullity.' " Plaintiffs further argue the "instruments attached to the [FAC] were attached for the purpose of *disputing* the statements made therein; of course they conflict with the allegations. It was judicial error to determine, based on the mere fact that they were attached to the [FAC], they demonstrated a conflict and that conflict should be resolved in favor of disputable hearsay statements nullifying allegations."

Plaintiffs also argue that they "never disputed the documents were recorded, which is why they were attached to the complaint. What they did dispute, was the hearsay statements *in the documents*. Notarizing documents with false statements, then recording them is a violation of Calif. Penal Codes §§ 115 and 115.5. The core purpose of § 115 is to protect the integrity and reliability of public records. This purpose is served by an interpretation that prohibits any knowing falsification of public records. (Pen. Code, § 115 . . . .) A false statement is void and if proven the instruments contain false statements, it is a felony. Calif. Penal Code § 115.5. A felony is unlawful and is a basis for [plaintiffs'] UCL claims."

We apply an abuse of discretion standard in reviewing a trial court's ruling on a request for judicial notice. (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th

256, 264 (*Fontenot*), disapproved on another ground as stated in *Yvanova*, *supra*, 62 Cal.4th at p. 939, fn. 13.)

Turning first to the 18 items that plaintiffs did not object to in the trial court, we conclude plaintiffs have forfeited on appeal any claim of error with respect to these judicially noticed documents. (See *Shuster v. BAC Home Loans Servicing, LP* (2012) 211 Cal.App.4th 505, 512, fn. 4 [noting the failure to object to the request for judicial notice in the trial court forfeits the objection on appeal].)

With respect to item Nos. (1) through (5) and (8), the record does not support plaintiffs' contention that the trial court accepted the "truthfulness" of the recorded documents in sustaining the demurrer of defendants. Rather, the record shows at most the court properly noticed the "existence and facial content of these recorded documents . . . under Evidence Code sections 452, subdivisions (c) and (h), and 453. (See *Fontenot*[, *supra*,] 198 Cal.App.4th [at pp.] 264–266.) Under Evidence Code section 459, [subdivision] (a), notice by this court is therefore mandatory. We therefore take notice of their existence and contents, though not of disputed or disputable facts stated therein. [Citation.]" (*Yvanova*, *supra*, 62 Cal.4th at p. 924, fn. 1; see *Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117–1118 [affirming the trial court's sustaining of a demurrer without leave to amend, in which the court took judicial notice of the parties, dates, and legal consequences of a series of recorded documents relating to a real estate transaction]; cf. *Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1375 [reversing grant of

summary judgment because the trial court improperly noticed statements of the truth of recited facts within the recorded documents].)

With respect to item Nos. (6) and (7) prepared in connection with the bankruptcy action, we conclude the court properly exercised its discretion in noticing them pursuant to Evidence Code section 452, subdivision (d) as "[r]ecords of . . . (2) any court of record of the United States. . . ."

With these principles in mind, we turn to the FAC.

C. *FAC*

Plaintiffs' FAC, which is nearly identical to the amended complaint in *Padilla I*, asserted the following 10 causes of action: cancellation of instruments, slander of title, violation of CHBR, violation of the UCL, breach of contract, wrongful foreclosure, fraud and deceit, negligence, accounting, and violation of Padilla's Fourteenth Amendment rights.

Under the rubric "Statement of Facts," plaintiffs in their FAC alleged that Padilla sought a loan from Wells Fargo in 2005 because it offered "loan and banking services geared toward[] Spanish speaking consumers" (¶ 15); that representatives from Wells Fargo "specifically" and "deliberately inflated Padilla's reported income from an approximately $6,500.00 per month to over $14,250.00 per month in order to qualify" him for the loan (¶ 17); that Wells Fargo provided Padilla with "written terms in English" regarding the interest rate he would pay for the loan and the terms of the loan, despite the fact Padilla was "a Hispanic man of national origin" and his "first language [was] Spanish" (¶¶ 20 & 21); that Wells Fargo knew Padilla "spoke and wrote in Spanish," but

presented him with documents "in English only" and "made no attempt to translate or otherwise explain the terms contained in the final documents in Spanish," in violation of the law including Civil Code section 1632[2] (¶¶ 22, 98, & 143); and that Padilla was unaware his loan would be placed in a real estate mortgage investment conduit (REMIC) subject to a pooling and service agreement (PSA). (¶¶ 23–26.)

This section of the FAC further alleged that in 2012 Padilla experienced a decline in income; that Wells Fargo "made no attempt to offer Padilla any of the government mandated programs . . . or any other alternative to foreclosure even though according to

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2 Subdivision (b) of Civil Code section 1632, provides in part: "Any person engaged in a trade or business who negotiates primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean, orally or in writing, in the course of entering into any of the following [transactions, as specifically enumerated], shall deliver to the other party to the contract or agreement and prior to the execution thereof, a translation of the contract or agreement in the language in which the contract or agreement was negotiated, that includes a translation of every term and condition in that contract or agreement. . . ." Plaintiffs' FAC includes myriad allegations of misconduct by defendants and/or their agents based on their failure to provide Padilla with documents in English, including referencing Civil Code section 1632. Although for purposes of this appeal we need not decide whether Civil Code section 1632 even applies in this case, we note there is persuasive authority from federal courts holding that this statute does not apply to a loan transaction, absent the involvement of a broker-dealer, and that in any event the cause of action based on this statute accrues when the plaintiffs signed the documents and did not receive such translations. (See *Ausano v. BAC Home Loans Servicing, LP* (S.D.Cal. Aug. 31, 2010) 2010 WL 3463647, at *3 (*Ausano*) [granting the motion to dismiss plaintiffs claim based on Civ. Code, § 1632 because "loans secured by real property are generally exempted from § 1632 and the requirement to translate documents," except "ones negotiated by a real estate broker," and because "it would have been obvious to Plaintiffs, even if they cannot read English, that they did not get Spanish translations of the loan documents" when they obtained the loan four years before filing their lawsuit]; *Lucero v. Diversified Investments Inc.* (S.D.Cal. Aug. 31, 2010) 2010 WL 3463607, at *6 (*Lucero*) [dismissing the plaintiffs' Civ. Code, § 1632 claim as untimely in their 2010 lawsuit against their lender because it was "obvious" when the plaintiffs signed the loan documents in 2006 that they did not receive Spanish translations of such documents].)

the United States Treasury Department, Padilla qualified for a modification and would have persevered [*sic*] his home through such a modification" (¶ 32); that Padilla was not informed of "his contractual right to bring forth a court action to assert the non-existence of a default or any defense to the acceleration of the loan, sale of the property, or for any other defense" (¶ 34); that "[o]n or about December 6, 2012 Travis Chapman, an employee of Ndex West, acting as an agent of Wells Fargo, recorded a Notice of Default improperly alleging that Wells Fargo had incurred a default and as a result had instructed Ndex West to exercise the power of sale clause," despite the fact Wells Fargo was neither the " 'Lender' nor the beneficial holder of the debt or deed of trust" (¶¶ 36–37); that the notice of default was "in English only, though Padilla was a recognized Spanish-speaking borrower" (¶ 39); that the notice of default included a declaration of compliance submitted by Wells Fargo pursuant to the CHBR stating it had used "due diligence to contact Padilla about foreclosure alternatives but was unsuccessful in reaching Padilla," which statements plaintiffs alleged were "false" and "hearsay" (¶ 40); that "Robert Harris, a Wells Fargo 'officer,' acting as the attorney in fact for U.S. Bank, answered legally propounded discovery under penalty of perjury, denying the WF Trust had any 'past due payments' due on the Subject Loan as of December 6, 2012, as claimed in the Notice of Default"[3] (¶ 42); that the January 2, 2013 assignment of DOT executed by Wells Fargo alleging it held a beneficial interest in the debt and said document and was transferring that interest to U.S. Bank was invalid, as it conflicted with the "legally propounded

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3 It does not appear this discovery, or the answers to such discovery, was attached to the FAC or otherwise included in the appellate record.

discovery" (allegedly provided by Wells Fargo officer Robert Harris, the Internal Revenue Code governing transfer of loans in default, and the PSA (¶¶ 43–49); and that the substitution of trustee signed by an officer of Wells Fargo on February 20, 2013 was invalid and therefore, the March 21, 2013 notice of trustee sale, and the trustee's deed upon sale issued in late January 2014 by Ndex, were also invalid (¶¶ 50–55).

Plaintiffs in this section of the FAC alleged in a single paragraph that all applicable statutes of limitation were tolled: "[Padilla] brought a claim against Defendants in a suit in 2014 that was dismissed[] without prejudice and taken up on appeal, February 2, 2015[,] with a final judgment rendered on January 5, 2016[,] and a remitter [*sic*] issued on March 15, 2016. Pursuant to California law, Plaintiff alleges any statute of limitations was tolled during this period." (¶ 58.)

In contrast to the "Statement of Facts," the FAC also included a section titled "Factual Allegations." In this section, plaintiffs alleged Wells Fargo knew in 2005 that the loan was to be converted into a security, which "fact" was "concealed" from Padilla and which "did not represent the true nature of the transaction in violation of Civil Code § 1549" (¶ 59); that if Padilla had known the Property "was to be used to secure a risky security investment he would not have consented to the transaction" (¶ 60); that because Wells Fargo had a "quota to meet," it encouraged its employees to "negotiate" the loan on the Property in Spanish, and then tricked Padilla by presenting all the loan documents in English "without translating the true terms negotiated in Spanish," as noted *ante* (¶ 61); that Wells Fargo "deceived Padilla into a higher cost loan than what was negotiated in Spanish by presenting the contracts only in English and with different terms than

negotiated, in violation [of the] Civil Code[] and Calif. Bus. & Prof. Code § 17200 et seq." (¶ 63); that as such, Padilla's "assent" to the loan "was obtained by misrepresentation and concealment" (¶ 64) and there was no "meeting of the minds as to the actual terms of the [loan] transaction such that no contract was formed"(¶ 65); that a " 'meeting of the minds' is essential to the validity of a contract, lack of mutual consent and understanding is a violation of Civil Code § 1549" (¶ 66); and that the DOT "is void on the basis it seeks to enforce the Subject Note, an unlawful and unenforceable note for reasons stated above, pursuant to Civil Code 1598," which also constituted "an unfair and deceptive business practice" under "Civil Code § 3391(3)" (¶¶ 69–70).

After making many additional allegations of wrongdoing by defendants regarding the initiation and completion of foreclosure, which allegations in most cases were comprised of a single sentence attacking every facet of that proceeding, plaintiffs (in conclusory fashion) alleged defendants were "estopped" from relying on any statutes of limitation as a basis for their demurrer pursuant to Civil Code section 3517.[4] (¶ 94.)

D. *Statutes of Limitation*

1. Accrual

In their opening brief, plaintiffs argue that the trial court erred in determining the date of accrual of the various statutes of limitation because it considered "only the date[s]

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4 Civil Code section 3517 states: "No one can take advantage of his [or her] own wrong."

of [defendants'] acts, and not the resulting harm and injury, which is the proper date to calculate the statute of limitations"; and that the date of their "injury" was the "transfer of title" from Padilla to U.S. Bank on January 31, 2014, *and* the loss of possession of the Property "on August 8, 2017,"[5] when Padilla finally moved from the Property pursuant to the stipulation with third-party Maham.

" 'Statute of limitations' is the collective term applied to acts or parts of acts that prescribe the periods beyond which a plaintiff may not bring a cause of action." (*Fox v. Ethicon Endo–Surgery, Inc.* (2005) 35 Cal.4th 797, 806 (*Fox*).) A plaintiff must bring a claim within the limitations period after the cause of action accrued, which happens " 'when the cause of action is complete with all of its elements.' " (*Ibid.*) Under the "last element" accrual rule, the statutes of limitation ordinarily runs from the occurrence of the last element essential to the cause of action — wrongdoing, causation, and harm. (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191 (*Aryeh*); see *City of Vista v. Robert Thomas Securities, Inc.* (2000) 84 Cal.App.4th 882, 886 (*City of Vista*) [noting when a "wrongful act does not result in immediate damage, 'the cause of action does not accrue prior to maturation of perceptible harm' "].)

"An important exception to the general rule of accrual is the 'discovery rule,' which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. [Citations.]" (*Fox*, *supra*, 35 Cal.4th at pp. 806–807.) "In

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5 The record shows that Padilla and Maham entered into the stipulation in 2016, as opposed to 2017, and that Padilla properly vacated the Property before September 15, 2016, as required under the terms of the stipulation.

order to rely on the discovery rule for delayed accrual of a cause of action, '[a] plaintiff whose complaint shows on its face that his [or her] claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery *and* (2) the inability to have made earlier discovery despite reasonable diligence.' [Citation.] In assessing the sufficiency of the allegations of delayed discovery, the court places the burden on the plaintiff to 'show diligence'; 'conclusory allegations will not withstand demurrer.' [Citation.]" (*Id.* at p. 808.)

Turning to the instant case, even if we were to conclude plaintiffs' FAC included properly pleaded facts — as opposed merely to "conclusory allegations" (see *Fox*, *supra*, 35 Cal.4th at p. 808) or no allegations whatsoever — showing Padilla's alleged inability to have made earlier discovery of the alleged wrongdoing of defendants, both in the loan origination in 2005 and in the foreclosure proceeding initiated in the fall of 2012, we nonetheless independently conclude that, through the exercise of reasonable diligence, Padilla would have discovered the misconduct of defendants no later than March 2013.[6]

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6 In our view, many of plaintiffs' causes of action likely accrued well before March 2013. (See, e.g., *Stalberg v. Western Title Ins. Co.* (1994) 27 Cal.App.4th 925, 929–930 [noting a claim for slander of title accrues when an alleged void or voidable document is recorded]; See *Ortega v. Wells Fargo Bank* (S.D.Cal. May 11, 2010) 2010 WL 1904878, at *3 (*Ortega*) [refusing to apply discovery rule to toll claims arising out of a residential mortgage transaction because the plaintiff, who did not speak English, waited two years after receiving the loan to conduct his " 'forensic review' " of those documents and "only a few weeks before receiving a [n]otice of [t]rustee's [s]ale," and because the plaintiff "did not question the propriety of his loan documents until months after he stopped paying his mortgage"]; *Ausano*, *supra*, 2010 WL 3463647, at *3; *Lucero*, *supra*, 2010 WL 3463607, at *6.)

That is, by March 2013, Padilla was, or, through the exercise of reasonable diligence should have been, aware of the following: the actual terms of the note and DOT, as opposed to what was allegedly represented to him (in Spanish) about *12 years* earlier, when the loan originated; the fact he allegedly could not afford the Property he had owned for almost *seven years* because his income had been artificially inflated in 2005 by "representatives" of Wells Fargo during the loan origination process; the fact defendants allegedly lacked the power to foreclose on the Property because the note and DOT were void or voidable; the fact that the various notices, including the default and trustee's sale, were allegedly void or voidable; the fact he was not informed of his "contractual right to bring a court action to assert the non-existence of the default or any defense to the acceleration of the loan" or sale of the Property, in connection with the December 6, 2012 notice of default, as set forth in the DOT he executed in 2005; the fact the October 29, 2012 "declaration of compliance" submitted by Wells Fargo in connection with the default notice was "false and hearsay" regarding defendants' attempts to contact Padilla "about foreclosure alternatives"; and the fact Padilla was in substantial danger of losing the Property to foreclosure, which led him to hire legal counsel and move for bankruptcy protection in April 2013.

Thus, based on the factual allegations of the FAC and documents properly noticed, we find only one conclusion can result: by March 2013, Padilla knew, or, with reasonable diligence should have known, of defendants' alleged wrongdoing both in connection with the loan origination in 2005 and with the foreclosure proceedings initiated in the fall of 2012. In addition, by March 2013, Padilla also had suffered

appreciable harm by such alleged wrongdoing, as evidenced by his obtaining legal counsel and ultimately, by his filing for bankruptcy the next month to stop foreclosure. (See *Fox*, *supra*, 35 Cal.4th at p. 807 [noting "suspicion of one or more of the elements of a cause of action, coupled with knowledge of any remaining elements, will generally trigger the statute of limitations period"].)

Plaintiffs nonetheless contend that their claims accrued in September 2016, when Padilla moved from the Property pursuant to the stipulation with Maham. We note, however, that this contention is unsupported by any authority or analysis. For this reason alone we disregard it. (See Cal. Rules of Court, rule 8.204(a)(1)(B) [each point must appear under a separate subheading *and* must be supported by argument and citation of authority, if any]; *People ex rel. Harris v. Aguayo* (2017) 11 Cal.App.5th 1150, 1175 (*Aguayo*) [noting the oft-cited rule that a court of review " 'need not address points in appellate briefs that are unsupported by adequate factual or legal analysis' "].)

In any event, we conclude this contention verges on the frivolous. As noted, many of the allegations of wrongdoing in the FAC involve conduct by defendants, and Wells

Fargo in particular, dating back to 2005.[7] Also as noted, many other allegations of wrongdoing relate to conduct by defendants in the fall of 2012, when foreclosure was initiated after Padilla defaulted on the loan. Clearly, by March 2013, Padilla understood the significance of the various documents he contends were wrongly recorded by defendants and/or their agents, all of which led him to hire legal counsel and seek bankruptcy protection the following month. (See *City of Vista*, *supra*, 84 Cal.App.4th at p. 886 [requiring among other elements " 'maturation of perceptible harm' " for a claim to accrue].) We thus reject plaintiffs' unsupported contention that their causes of action did not accrue until Padilla moved from the Property in September 2016.

2. The Statutes of Limitation Were Not Tolled at Any Time During the Pendency of *Padilla I*

We next must decide whether any of the statutes of limitation were "tolled" during "portions" of *Padilla I*. We say "portions" because initially it was not altogether clear from plaintiffs' opening brief what time period they contended the limitations periods were tolled during *Padilla I*. As noted *ante*, in paragraph 58 of their FAC they referenced

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[7] We note that plaintiffs do not specifically allege in the FAC that Padilla could not understand the legal significance of the loan documents he signed in 2005 because they were presented to him only in English. Instead, the FAC repeatedly states that Padilla's first language was Spanish, but appears to stop short of alleging he could neither read nor understand English. Moreover, the record shows Padilla stated in English under penalty of perjury that he had read, understood, and verified the subject matters in the complaints in *Padilla I* and *II*, and that he stated in English, again under penalty of perjury, that he had read, and declared as "true," myriad complex disclosures and schedules in connection with his 2013 bankruptcy action. There is no indication from these or other documents in the record that Padilla needed them translated into Spanish for him to understand their contents.

the filing of Padilla's lawsuit in 2014, the date (early Feb. 2015) they appealed the dismissal of that lawsuit, the date this court issued its opinion in *Padilla I* (Jan. 5, 2016), and the date the remittitur issued (Mar. 15, 2016), in asserting the applicable statutes of limitation were tolled "[p]ursuant to California law."[8]

However, in their reply brief, plaintiffs clarify that they are *not* claiming the applicable statutes of limitation were tolled *throughout* the pendency of *Padilla I*, that is, from the filing of their complaint in May 2014 through the date the remittitur issued. Instead, they claim the statutes of limitation were tolled only during the time the case was on appeal: "from February 5, 2015 to . . . March 15, 2016, for a period 1 year and approximately 3 weeks; [as] he [i.e., Padilla] has not argued SOL [i.e., statutes of limitation] for the time the litigation was with the trial court."

a. *The Applicable Statutes of Limitation Were Neither Tolled "as a Matter of Law" Nor Under the Equitable Tolling Doctrine*

Plaintiffs in their opening brief rely on a single authority, *Lee C. Hess Co. v. City of Susanville* (1959) 176 Cal.App.2d 594 (*Hess*), to support their argument that the statutes of limitation were tolled as a matter of law only while *Padilla I* was pending on appeal. Before reaching the merits of this issue, we once again note plaintiffs provided virtually no analysis regarding how *Hess* applies to the instant dispute, including to their novel argument that the pendency of an appeal, as opposed to the underlying litigation

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8 Clearly, we are not bound by plaintiffs' conclusory tolling allegations in independently determining whether the demurrer was properly sustained without leave to amend. (See *Yvanova*, *supra*, 62 Cal.4th at p. 924; *Evans*, *supra*, 38 Cal.4th at p. 6.)

from which the appeal is taken, acts to toll any statutes of limitation. It was plaintiffs' burden to demonstrate the court erred in rejecting their tolling argument; at a minimum, plaintiffs were required to provide this court with reasoned argument *and* explain how that authority supports their position. (See Cal. Rules of Court, rule 8.204(a)(1)(B) & (C); *Aguayo*, *supra*, 11 Cal.App.5th at p. 1175.)

Reaching the merits, *Hess* involved the issue of whether a plaintiff contractor could recover damages from a city caused by a three-year delay in a public works contract, after the city initially awarded the contract to the plaintiff, then mistakenly determined the plaintiff was not properly licensed and awarded the contract to the next lowest bidder, which award the plaintiff challenged in court and successfully overturned. (*Hess*, *supra*, 176 Cal.App.2d at p. 596.) In concluding that the statutes of limitation did not bar the plaintiffs' action for damages *after* it had succeeded in its action to invalidate the award to the next lowest bidder, the *Hess* court correctly noted that the plaintiff "had no cause of action until it was finally judicially determined that respondent [the city] had wrongfully breached its contract" with the plaintiff by awarding the public works contract to another bidder. (*Id.* at p. 598.)

The circumstances in *Hess* are completely different from those presented in the instant case. Here, plaintiffs in *Padilla II* filed the *same* litigation involving the *same* primary rights that were the subject of *Padilla I*, which action was dismissed without prejudice for lack of standing. *Hess* therefore is not authority for the proposition that an appeal from an action dismissed without prejudice tolls all applicable statutes of limitation as a matter of law only while the action is pending on appeal.

Plaintiffs in their reply brief argue for the *first time on appeal* that, although they did "identify . . . suspension of the [statutes of limitation] as equitable tolling, though clearly, it is a doctrine that applies; and if it applies, the trial court erred in dismissing the [FAC] without leave to amend so that [plaintiffs] could in fact, provide the requisite facts." We reject this claim of alleged error.

First, challenges to a trial court judgment or order not raised in an opening brief may be treated as forfeited by the appellate court in order to prevent one party from "sandbagging" another party. (See *Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 685 (*Paulus*) [concluding the plaintiff "abandoned any challenge" to an order striking his claims for abuse of process and for intentional interference "because of his failure to address the matter in his opening brief"]; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894, fn. 10 (*Shade Foods*) [refusing to consider arguments raised for the first time in a reply brief regarding an exclusion to reduce insurance coverage because " ' "points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before" ' "]; *American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453 (*Stroh*) [refusing to consider the plaintiff's request to treat its appeal as a petition for extraordinary relief because that request "was not made in its opening brief, but was raised for the first time in its reply brief," thus "depriv[ing] the respondent of an opportunity to counter the argument"].)

Here, we conclude plaintiffs abandoned their claim that the court erred in refusing to grant them leave to amend to allege "facts" supporting the equitable tolling doctrine.

We note plaintiffs provided no reason, much less a "good reason" (see *Shade Foods*, *supra*, 78 Cal.App.4th at p. 894, fn. 10), why they could not have made this argument in their opening brief, giving defendants the opportunity to respond. (See *ibid.*; see also *Paulus*, *supra*, 139 Cal.App.4th at p. 685; *Stroh*, *supra*, 10 Cal.App.4th at p. 1453.)

Second and perhaps more important, we conclude plaintiffs on appeal forfeited this claim of error because they expressly stated in their opening brief that they were *not* relying on the equitable tolling doctrine to support their tolling argument. Specifically, plaintiffs in their opening brief stated they "did *not* allege 'equitable tolling' but rather detailed in their complaint, at ¶ 58 the dates of the prior litigation and how that appeal tolled the statute of limitations as a matter of law" (italics added).

" ' "The doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process. . . . 'The policies underlying preclusion of inconsistent positions are "general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings. . . . " ' Judicial estoppel is 'intended to protect against a litigant playing "fast and loose with the courts." ' " ' [*Russell v. Rolfs* (9th Cir.1990) 893 F.2d 1033, 1037.) 'It seems patently wrong to allow a person to abuse the judicial process by first [advocating] one position, and later, if it becomes beneficial, to assert the opposite.' [Citation.]" ' " (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181 (*Jackson*); see *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1350, fn. 12 (*Cable Connection*) [noting a " 'party is not

permitted to change his [or her] position and adopt a new and different theory on appeal,' " as " 'permit[ting] him [or her] to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant [citation]' "].)

We thus conclude as a matter of law that the doctrine of judicial estoppel precludes plaintiffs from relying on the equitable tolling doctrine to assert error in connection with the sustained demurrer when previously they expressly disavowed any reliance on this doctrine. (See *Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, 1315 [noting when the " 'the facts are undisputed, the existence of an estoppel is a question of law' "]; *Cable Connection*, *supra*, 44 Cal.4th at p. 1350, fn. 12; *Jackson*, *supra*, 60 Cal.App.4th at p. 181.)

Finally, we also conclude plaintiffs separately forfeited this claim of error on appeal because they did *not* rely on the equitable tolling doctrine when they opposed the demurrer to the FAC. It is axiomatic that a failure to raise an issue in the trial court forfeits the point on appeal. (See, e.g., *Feduniak v. California Coastal Com.* (2007) 148 Cal.App.4th 1346, 1381.) The record shows plaintiffs in their opposition papers cited *Hess* and argued to the trial court that their "claims were 'suspended' or 'tolled' from February 5, 2015 to the issuance of the remitter [*sic*] on March 15, 2016." We note this contention of plaintiffs is consistent with their tolling argument on appeal. For all these reasons, we independently conclude the equitable tolling doctrine does not apply in this case.

b. *The Applicable Statutes of Limitation Continued to Run as if* Padilla I *Had Never Been Filed*

" 'A dismissal "without prejudice" necessarily means without prejudice to the filing of a new action on the same allegations, so long as it is done within the period of the appropriate statute of limitations. [Citations.]' [Citation.]" (*Cardiff Equities, Inc. v. Superior Court* (2008) 166 Cal.App.4th 1541, 1550.) "When [statutory] protections operate to bring about a dismissal, the applicability of the pertinent statute of limitations is restored as *if no action had been brought*. [Citations.] In this respect the law of California is consistent with what has been stated to be the rule in the majority of jurisdictions. 'In the absence of a statute, a party cannot deduct from the period of the statute of limitations applicable to his [or her] case the time consumed by the pendency of an action in which he [or she] sought to have the matter adjudicated, but which was dismissed without prejudice to him [or her]. . . .' [Citation.]" (*Wood v. Elling Corp.* (1977) 20 Cal.3d 353, 359, fn. omitted (*Wood*); see *Elling Corp. v. Superior Court* (1975) 48 Cal.App.3d. 89, 96 [noting the dismissal for failure to serve summons was not on the merits, and, subject to the statute of limitations, the plaintiff may refile identical action].)

In *Wood*, our high court determined that when a case is dismissed without prejudice, "the applicability of the pertinent statute of limitations is restored as *if no action had been brought*." (*Wood, supra*, 20 Cal.3d at p. 359.) Otherwise, "[i]f a timely action dismissed without prejudice were, without more, to have the effect of tolling the statute of limitations during the pendency of that action, an indefinite extension of the

statutory period — through successive filings and dismissals — might well result." (*Id.* at pp. 359–360.)

Applying, as we must (see *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456), the rule set forth in *Wood* to the instant case, we conclude the statutes of limitation were not tolled by the filing of the action in *Padilla I* because that action was dismissed without prejudice, leading plaintiffs in *Padilla II* to file more than a year later the *same* action involving the *same* primary rights. As the *Wood* court teaches, once *Padilla I* was dismissed without prejudice based on Padilla's lack of standing, the "applicability of the pertinent statute of limitations [was] restored as *if no action had been brought*." (See *Wood*, *supra*, 20 Cal.3d at p. 359.) We thus conclude the applicable statutes of limitation were not tolled as a result of Padilla's filing of the action in *Padilla I*.

3. Plaintiffs' Claims Are Barred by the Applicable Statutes of Limitation

Plaintiffs' claims in the FAC are governed by the following statutes of limitation: three years for cancellation of instruments (Code Civ. Proc., § 338, subd. (d)), slander of title (*id.*, subd. (g)), violation of CHBR (*id.*, subd. (a)), wrongful foreclosure (*id.*, subds. (a) & (d)), and fraud and deceit (*id.*, subd. (d)) (respectively, the first, second, third, sixth, and seventh causes of action); four years for violation of the UCL (Bus. & Prof. Code, § 17208) and breach of written contract (Code Civ. Proc., § 337, subd. (a)) (respectively, fourth and fifth causes of action); and two years for negligence (Code Civ. Proc., § 335.1) (eighth cause of action).

Because we conclude that — plaintiffs' claims accrued at the latest by March 2013, when Padilla hired legal counsel and moved to stop foreclosure after receiving the notice of trustee's sale; the appeal in *Padilla I* did not "as a matter of law" toll any of the applicable statutes of limitation, as plaintiffs argue on appeal; and the statutes of limitation continued to run as if *Padilla I* had never been brought as a result of the dismissal of that action without prejudice; we further conclude that plaintiffs' first, second, third, fourth, fifth, sixth, seventh, and eighth causes of action are time-barred, inasmuch as plaintiffs did not file the instant action until April 2017, or more than four years after they accrued.

4. Remaining Causes of Action

a. *10th Cause of Action for "Violation of 14th Amendment"*

Plaintiffs in this cause of action allege defendants violated Padilla's Fourteenth Amendment rights to "notice" and a "hearing" because they failed in December 2012 to give him notice of his right to bring a legal action, as set forth in (the italicized portion of) section 22 of the DOT.[9] (¶¶ 253–254.)

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9 Section 22 of the DOT provides in part as follows: "Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration *and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale*." (Italics added.)

We note this novel cause of action is nearly identical to plaintiffs' fifth cause of action for breach of contract. Plaintiffs similarly alleged in their fifth cause of action that defendants breached the DOT when they failed to give Padilla notice under section 22 of his right to file an action "in defense of the default" (¶¶ 174 et seq.). Plaintiffs further alleged that such notice was a "condition precedent" to the recording of any documents, including the December 6, 2012 notice of default (¶¶ 174–177), and that they were "prejudiced and harmed because [Padilla] did not know of his right to bring forth an action at the time of the [notice of default]." (¶ 181.)

Assuming a cause of action for "Violation of 14th Amendment Rights" even exists, we independently conclude the court properly sustained the demurrer to this claim without leave to amend.

First, Padilla knew, or through reasonable diligence should have known, at the *latest*[10] by March 2013 of the contents of the note and DOT he signed in 2005, including his right to file an action to challenge the foreclosure. Thus, even if we conclude a four-year limitations period applies to plaintiffs' 10th cause of action, which by all accounts is nearly identical to his breach of contract action, we still would conclude it was outside the applicable limitations period, as discussed *ante*.

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10 We say "at the latest" because when Padilla signed the various loan documents in 2005, he knew *then* he was not provided Spanish translations of such documents. The FAC does not allege that Padilla asked Wells Fargo for Spanish translations but never received them, or that Padilla himself, through reasonable diligence, was unable to obtain such translations before he defaulted on the loan seven *years* after it originated. (See *Ortega*, *supra*, 2010 WL 1904878, at *3; *Ausano*, *supra*, 2010 WL 3463647, at *3; *Lucero*, *supra*, 2010 WL 3463607, at *6.)

Second, we conclude as a matter of law that Padilla was not harmed in connection with this cause of action (or, for that matter, with respect to his similar fifth cause of action for breach of contract). (See *Coles v. Glaser* (2016) 2 Cal.App.5th 384, 391 (*Coles*) [noting the elements of a cause of action for breach of contract are: " ' "(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff" ' [citation]".)

Indeed, the record shows Padilla hired legal counsel and moved for bankruptcy protection in April 2013 " 'in an attempt to find resolution for the loan.' " (*Padilla I*, *supra*, WL 66546, *2.) The record also shows Padilla sued defendants in May 2014 (*Padilla I*). Thus, notwithstanding plaintiffs overly broad contentions to the contrary, we conclude as a matter of law that plaintiffs cannot plead facts showing "resulting damages" based on defendants' alleged breach of the DOT in failing to advise Padilla in December 2012 of his right to file an action in connection with the notice of default. (See *Coles*, *supra*, 2 Cal.App.5th at p. 391.)

b. *Accounting*

Plaintiffs' ninth cause of action is for an accounting. An accounting is not an independent cause of action but a type of remedy that depends on the validity of the underlying claims. (*Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, 82, disapproved on another ground in *McWilliams v. City of Long Beach* (2013) 56 Cal.4th 613, 626; see *Janis v. California State Lottery Comm.* (1998) 68 Cal App 4th 824, 833–834 [noting that a "right to an accounting is derivative; it must be based on other claims"].) Because plaintiffs' other claims fail, so too does their accounting claim.

E. *Leave to Amend*

When a complaint fails to allege facts sufficient to state a cause of action and the trial court has sustained a demurrer without leave to amend, such as in the instant case, "we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (*Blank*).)

In light of our decision that the statutes of limitation have run on any cause of action plaintiffs can bring against defendants based on their alleged wrongdoing as set forth in the FAC, we conclude there is no "reasonable possibility" this defect can be cured by further amendment. (See *Blank*, *supra*, 39 Cal.3d at p. 318.) As such, we also conclude the court did not abuse its discretion when it refused to grant plaintiffs leave to amend their FAC. (See *Freeny v. City of San Buenaventura* (2013) 216 Cal.App.4th 1333, 1339 [noting review of a trial court's decision to deny leave to amend is for an abuse of discretion].)[11]

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11 In light of our decision disposing of this appeal on the ground plaintiffs' claims in the FAC were barred by the applicable statutes of limitation, we deem it unnecessary to reach any of the parties' other contentions on appeal.

DISPOSITION

The judgment in favor of defendants is affirmed. Defendants to recover their costs of appeal.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.